

NOT FOR CITATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SPIRO ZOGRAFOS,

Plaintiff,

v.

CITY AND COUNTY OF SAN
FRANCISCO, et al;

Defendants.

No. C 05-3881 PJH

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

Defendant City and County of San Francisco's ("CCSF" or the "City") motion for summary judgment as to all claims in this case came on for hearing before the court on November 22, 2006.¹ CCSF appeared through its counsel, Jonathan Rolnick; and plaintiff Spiro Zografos ("Zografos") appeared through his counsel, Thomas Duckworth. Having read the papers filed in conjunction with the motion and carefully considered the arguments and the relevant legal authority, for the reasons that follow, the court GRANTS CCSF's motion in part and DENIES it in part.

PROCEDURAL HISTORY

This is an action brought under 42 U.S.C. § 1983. Zografos worked for the City's Municipal Railway ("MUNI"), and claims that CCSF violated his constitutional right to due process in connection with his termination following a fight with co-worker and defendant Morey.

¹This order does not dispose of the claims brought against defendant, Kenneth Morey ("Morey") in his individual capacity. Morey retained separate representation, and has filed counterclaims. Morey did not join in CCSF's motion or file a motion of his own, and the dispositive motion cut-off date has passed.

1 Zografos filed the complaint in this case, which alleged nine claims, including one
2 federal and eight state law claims, in state court on August 10, 2005. Defendants removed
3 the case to this court on September 26, 2005. On October 10, 2006, the parties stipulated
4 to dismiss four of the eight state law claims, leaving four state law and one federal claim.
5 The remaining claims are set forth below. However, as CCSF correctly noted in its motion
6 papers, Zografos' single section 1983 claim actually includes four separate claims. Thus,
7 there are eight claims at issue in this motion.

8 The claims are as follows:

9 **Section 1983 Claims**

10 (1) Violation of Zografos' procedural due process rights under the Fifth and
11 Fourteenth Amendments: in terminating Zografos' employment, CCSF violated
12 Zografos' *property interest* in public employment;

13 (2) Violation of Zografos' procedural due process rights under the Fifth and
14 Fourteenth Amendments: in terminating Zografos' employment, CCSF violated
15 Zografos' *liberty interest*;

16 (3) Violation of Zografos' *substantive* due process rights under the Fifth and
17 Fourteenth Amendments in terminating his employment;

18 (4) Violation of Zografos' First and Fourteenth Amendment Rights: in terminating
19 his employment, CCSF retaliated against Zografos for engaging in protected
20 speech;

21 **State Law Claims**

22 (5) Negligent supervision;

23 (6) Negligent retention;

24 (7) Intentional infliction of emotional distress; and

25 (8) Negligent infliction of emotional distress.

26 **FACTUAL BACKGROUND**

27 In support of its motion, CCSF submitted numerous declarations and exhibits,
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1 including those from Don Gee, Diana Buchbinder, Vernon Crawley, and attorney Jonathan
2 Rolnick. In opposition, Zografos has submitted his own declaration and exhibits and that of
3 his attorney Thomas Duckworth.

4 Zografos was hired in June 1998 as an automotive machinist for MUNI, and worked
5 there for over six years until he was terminated in late 2004 following an October 29, 2004
6 altercation with defendant Morey, who was also employed by MUNI. Throughout his
7 employment, Zografos worked at a repair shop in the Woods Maintenance Division
8 ("Woods"). He became a permanent full-time employee there in July 1999. Zografos was
9 also a machinist union member, and from 1999-2003, Zografos served as the union
10 steward.

11 Zografos' employment was governed in part by the terms of a memorandum of
12 understanding ("MOU") between his union and the City. At the time Zografos was hired, he
13 signed an acknowledgment of receipt of the City's policies prohibiting workplace violence.

14 Beginning in early 2002, Zografos lodged a number of complaints with MUNI
15 management regarding a variety of workplace issues. Zografos made his first and only
16 complaints to Cal/OSHA in February 2002 regarding safety issues at Woods – including
17 dust in the brake repair room ventilation system, the fire alarm and suppression system,
18 and the hydraulic lifts. Zografos made the complaint via telephone, but the verbal
19 complaint followed a written complaint that he had made directly to MUNI regarding the
20 same issues. Zografos conceded that the only colleague that he told about his call to
21 Cal/OSHA was co-worker, Steve Haver. Zografos Depo. at 85-86. Haver had also
22 complained to defendant regarding health and safety issues at Woods.

23 Soon after the February 2002 complaint, an OSHA investigator inspected Woods,
24 and the Woods superintendent at the time, Carl Ware, asked Zografos to escort the
25 inspector around the facility.² As a result, OSHA issued several citations against Woods.

27 ²Ware was the superintendent at Woods facility until approximately February 14, 2004.
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1 CCSF claims that MUNI repaired the cited defects.

2 Zografos then claims that following the OSHA site inspection, several colleagues
3 and Woods management became hostile toward him as a result of “rumors” that he had
4 complained to OSHA. Zografos claims that it was “common knowledge” among the Woods
5 employees and management that he had complained. There is some dispute regarding his
6 colleagues’ knowledge of the complaints.

7 In terms of management’s knowledge, Zografos claims that management employees
8 Carl Ware, Kenneth Sapp,³ and Don Gee not only knew that he was responsible for the
9 complaint, but were upset about it. The evidence in support of Zografos’ contention that
10 management was upset comes primarily from the deposition testimony of Zografos’
11 immediate supervisor, Alfred Frendo.⁴ It is disputed in part by Gee’s declaration and
12 deposition testimony. Gee attested that he had no knowledge that Zografos contacted
13 OSHA until Zografos’ termination. Gee Decl. at pars. 21-25. However, Zografos asserts
14 that Frendo actually wrote Gee a letter in January 2002 in response to what he believed
15 were negative comments from Ware regarding Zografos’ complaints, and defended
16 Zografos’ actions, which Frendo believed were in the interests of health and safety at the
17 Woods facility. Sapp acknowledged that he heard a rumor that Zografos was involved in
18 the OSHA complaint.

19 However, it is undisputed that following Zografos’ complaint to OSHA, he also
20 lodged with MUNI several complaints against his co-workers, and complaints regarding
21 other safety issues at Woods. These complaints concerned his co-workers’ alleged
22 harassment and threats, in addition to complaints regarding his co-workers’ performance
23 (e.g., employees sleeping on the job, leaving work early while still on the clock, and locking
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25 ³Sapp was the acting superintendent at Woods on October 29, 2004, while Williamson
26 was on vacation.

27 ⁴Frendo was Zografos’ immediate supervisor at Woods facility until 2003, and reported
28 himself to Gee, Ware, and Sapp.

1 the facility's exit door). It is also undisputed that MUNI management was well aware of
2 these complaints.

3 A chronology of events follows. In May 2002, Zografos complained to MUNI
4 regarding the lack of protective steel-toed shoes, which MUNI later provided.

5 The tension at the Woods facility appears to have heated up around summer 2002.
6 During that time, Morey approached Zografos and told him he shouldn't worry so much.
7 Zografos reported that his car was vandalized at work to Frendo, and asked that the fire
8 exit door remain closed so that employees could not enter and exit the workshop. Haver
9 also filed a grievance with MUNI's human resources department regarding harassment by
10 Woods employees.

11 At the end of 2002, Morey and other Woods co-workers made comments about
12 Zografos' family, and called Zografos names. The harassment continued into 2003. In
13 early 2003, Zografos was threatened by another co-worker, Ron Curley, who threatened to
14 "kick his ass;" Morey poured liquid into Zografos' work stereo; Zografos' car was vandalized
15 at work again; and someone put stickers on Zografos' toolbox and greased its handle.
16 During this time period, Zografos complained to Frendo.

17 In March 2003, Gee became aware of a "constant string of complaints" from Woods
18 employees about each other. Gee and Ware decided that management intervention was
19 going to be necessary. Gee asked Ware and Frendo to investigate the complaints.

20 On March 17, 2003, Ware sent Frendo a memo regarding complaints by Woods
21 employees against Zografos, alleging that Zografos had been harassing them. Two days
22 later, on March 19, 2003, Zografos complained in writing about harassment at work to
23 Frendo, who provided copies to Ware and human resources. Subsequently, on March 20,
24 2003, Frendo wrote Ware an interoffice memo stating that he was unaware of harassment
25 at Woods by anyone.

26 Around May-June 2003, Ware suspected that Frendo's report of no harassment was
27 inaccurate. Ware notified Zografos in writing that Frendo was being trained in how to
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1 respond to harassment, and that MUNI was making changes regarding the supervision at
2 Woods. Ware subsequently removed Frendo from his supervisory position at Woods, and
3 replaced him with Andy Andrich. Ware also met with all Woods employees regarding
4 harassment complaints, at which time Zografos and Curley shook hands and agreed to
5 resolve their differences. However, sometime around this time, in May 2003, Zografos
6 complained again to Andrich regarding his car being vandalized.

7 Beginning in May- July 2003, MUNI's Equal Employment Opportunity ("EEO")
8 section of the human resources division conducted three anti-violence training sessions at
9 Woods. The EEO began conducting the training because it was clear that the Woods
10 facility suffered from ongoing tension, and that the unit was divided into two or three
11 different groups who constantly complained to management about harassment and threats
12 from each other. Crawley Decl. at par. 20.⁵

13 Meanwhile, on July 1, 2003, Zografos filed a complaint with MUNI's EEO section
14 alleging continuous harassment and also retaliation for testifying against Sapp, then a
15 Woods supervisor, at an unrelated EEO proceeding.

16 On September 30, 2003, the EEO section notified Woods management, specifically
17 Ware, regarding Zografos' July 1, 2003 EEO complaint. That letter instructed management
18 that it was prohibited from retaliating against Zografos in any way.

19 The problems at Woods continued into 2004 in spite of the training and attempts to
20 redress the tensions. In January 2004, co-worker Dave Lopez called Zografos a "kiss ass."
21 Zografos complained to Andrich, and contends nothing was done. On February 14, 2004,
22 Ware retired, and Paul Williamson became the new superintendent at Woods. In July
23 2004, Williamson moved his office down into the repair unit in order to monitor employee
24 conduct.

25 Later that summer, on August 27, 2004, Morey and Zografos had another

27 ⁵Crawley was the manager of MUNI's EEO section.

1 altercation. Zografos contends that Morey threatened Zografos to go outside and fight him.
2 Haver notified Williamson. Williamson sent Zografos home without pay that day.

3 On August 30, 2004, Williamson recommended that two Woods employees be
4 reassigned to other work sites in the city due to the hostile climate in the facility, but did not
5 mention the workers to be transferred by name. Buchbinder Decl., Exh. I. Diana
6 Buchbinder, MUNI's deputy director of employee and labor relations, then spoke with
7 Williamson on the phone, who confirmed that the employees he sought to transfer were
8 Morey and Zografos. Buchbinder advised Williamson that the workplace tensions needed
9 to be resolved, and that MUNI could not simply move problematic employees to another
10 department. Buchbinder Decl. at par. 9. She advised Williamson to continue monitoring
11 the situation and to make EEO counseling available to the employees. *Id.* If those
12 methods were unsuccessful, then disciplinary measures would be necessary. *Id.*

13 On October 18, 2004, Zografos alerted Williamson that Morey was taunting him
14 again. Williamson allegedly responded that "maybe Morey wants to go trick or treating with
15 Zografos." On October 28, 2004, the day before the incident that led to Zografos'
16 termination, Morey allegedly pursued Zografos in his car on the freeway, and made
17 threatening gestures for Zografos to pull over.

18 On the morning of October 29, 2004, Morey and Zografos got into a fight at work,
19 which resulted in Zografos being taken by ambulance to the hospital with an injured jaw,
20 concussion, back and shoulder injuries, and internal and external bruising. Zografos and
21 Morey dispute who started the fight. Zografos contends that the fight began after Morey's
22 taunting.

23 Gee learned of the fight, and asked Sapp, acting Woods superintendent, to
24 investigate the incident. Sapp interviewed a number of employees who he believed might
25 have information, but the employees denied seeing anything. Sapp notified Gee that he did
26 not believe the employees were being truthful. Gee then spoke to several of the witnesses
27 himself, and required them to sign witness statements. He reviewed the statements, and
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1 also suspected that the employees were not being honest with their denials. Nevertheless,
2 Gee asserts that he concluded that the incident was “an act of mutual combat” upon
3 learning that neither Morey nor Zografos were taking responsibility for the incident. Gee
4 then recommended that both Zografos and Morey be terminated.⁶

5 Meanwhile, another human resources employee, Mabel Sha, advised Buchbinder of
6 the fight. Buchbinder asked Sha to investigate the matter, and place Zografos and Morey
7 on unpaid administrative leave, the standard MUNI procedure in cases of workplace
8 violence. Buchbinder Decl. at par. 10.

9 On November 1, 2004, Zografos was advised by letter that his pre-termination *Skelly*
10 hearing was set for November 16, 2004. Buchbinder Decl., Exh. J. In that letter, CCSF
11 advised Zografos that he had a right to have representation at the hearing. It also advised
12 him that:

13 Once the investigation is completed, and charges, if any, are formalized, you
14 will be provided with a copy of the charges, any additional supporting
documentation, and evidence that the department intends to use to support
the charges. You will be given an opportunity to respond to the charges.

15 *Id.*

16 The pre-termination, or *Skelly* hearing, took place on November 17, 2004. Zografos,
17 his brother and representative, Taso Zografos, Sapp, acting superintendent, Parveen
18 Boparai, senior personnel analyst, Mabel Sha, senior personnel officer, and Gee were
19 present. At that hearing, Zografos was advised that he was being charged with
20 Mistreatment of Persons, Violence in the Work Place and Assault. Buchbinder Decl., Exh.
21 L. Apparently, Zografos was provided with “documentation supporting the charges,” *id.*,
22 which Zografos claims included only the witness statements, in which the witnesses denied
23 having seen anything. Zografos was also advised that he could respond to the charges at
24 the hearing or in writing, and request a second hearing. *Id.*

25 On November 21, 2004, Zografos responded to the charges in a letter addressed to

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27 ⁶At some point, at least a couple of the witnesses changed their stories. Gee asserts
this would not have changed his recommendation, though.

1 Mabel Sha, and cc'ed to Gee.⁷ See Zografos Decl., Exh. E. In that letter, Zografos
2 complained that at the November 17, 2004 hearing, MUNI did not supply him with an
3 explanation or details regarding the specific charges. Zografos then responded to
4 questions propounded at the hearing, and provided his version of the events of October 29,
5 2004. In sum, Zografos alleged that Morey struck him first in his head and face, and then
6 continued to strike him repeatedly, and that he had difficulty defending himself because his
7 hands were in his pockets. Zografos asserted that he ended up on the floor, and tried to
8 pull Morey down to prevent Morey from kicking him. Zografos did not know what motivated
9 Morey to attack him. *Id.*

10 Thereafter, on November 30, 2004, Gee recommended in writing termination of
11 Zografos. Buchbinder Decl., Exh. L. Ultimately, Gee recommended termination based on
12 the "evidence and testimony at the hearing" which "established that: 1) Zografos fought on
13 MUNI property; and 2) Zografos caused false statements to be entered into the
14 investigation." *Id.*

15 Buchbinder approved Zografos' dismissal, and notified him of the decision in a
16 December 8, 2004 letter. On December 14, 2004, Zografos notified Buchbinder that he
17 wished to appeal the dismissal. Thereafter, Buchbinder confirmed in writing that Zografos
18 was appealing the dismissal, but some confusion regarding whether he was representing
19 himself or not followed. Buchbinder asked Zografos to confirm whether or not he would be
20 represented at the hearing, and she also set a hearing date for January 31, 2005 with
21 hearing officer Susan Mosk. A series of letters between Zografos and Buchbinder followed,
22 in addition to several extensions of the appeal hearing date. On February 2, 2005,
23 Zografos notified Buchbinder that current counsel, Duckworth, would represent him.
24 Buchbinder contacted Duckworth, and they rescheduled the hearing for March 4, 2005.

25 On March 3, 2005, Duckworth advised Buchbinder that Zografos was withdrawing

26 ⁷CCSF states that the letter was to Michael Burns, the executive director of MUNI, but
27 the citations are not to any such letter. CCSF appears to be mistaken.

1 his appeal because he felt that the hearing would not be fair. Thereafter, Buchbinder
2 confirmed in a letter to Duckworth that the hearing was cancelled and that “by withdrawing
3 his appeal, Zografos is accepting the dismissal decision communicated to him in December
4 2004, and that final documentation will be forthcoming.” *Id.* at Exh. EE. She also noted
5 that her conversation with Duckworth on the morning of March 3, 2005 was “the first time
6 any concerns have been raised regarding a fair and impartial hearing.” *Id.*

7 DISCUSSION

8 A. Legal Standards

9 Summary judgment is appropriate when there is no genuine issue as to material
10 facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.
11 Material facts are those that might affect the outcome of the case. *Anderson v. Liberty*
12 *Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is “genuine” if there
13 is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.*

14 A party seeking summary judgment bears the initial burden of informing the court of
15 the basis for its motion, and of identifying those portions of the pleadings and discovery
16 responses that demonstrate the absence of a genuine issue of material fact. *Celotex Corp.*
17 *v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof
18 at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other
19 than for the moving party. On an issue where the nonmoving party will bear the burden of
20 proof at trial, the moving party can prevail merely by pointing out to the district court that
21 there is an absence of evidence to support the nonmoving party’s case. *Id.* If the moving
22 party meets its initial burden, the opposing party must then set forth specific facts showing
23 that there is some genuine issue for trial in order to defeat the motion. See Fed. R. Civ. P.
24 56(e); *Anderson*, 477 U.S. at 250.

25 “To show the existence of a ‘genuine’ issue, . . . [a plaintiff] must produce at least
26 some significant probative evidence tending to support the complaint.” *Smolen v. Deloitte,*
27 *Haskins & Sells*, 921 F.2d 959, 963 (9th Cir. 1990) (quotations omitted). The court must
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view the evidence in the light most favorable to the non-moving party. *United States v. City of Tacoma*, 332 F.3d 574, 578 (9th Cir. 2003). The court must not weigh the evidence or determine the truth of the matter, but only determine whether there is a genuine issue for trial. *Balint v. Carson City*, 180 F.3d 1047, 1054 (9th Cir. 1999). If the nonmoving party fails to show that there is a genuine issue for trial, “the moving party is entitled to judgment as a matter of law.” *Celotex*, 477 U.S. at 323. Regardless of whether plaintiff or defendant is the moving party, each party must “establish the existence of the elements essential to [its] case, and on which [it] will bear the burden of proof at trial.” *Id.* at 322.

B. Defendant’s Motion

1. Section 1983 Procedural Due Process Claims: Property and Liberty Interests

The Fourteenth Amendment’s guarantee of procedural due process applies when a constitutionally protected liberty or property interest is at stake. *Vanelli v. Reynolds School Dist.*, 667 F.2d 773, 776 (9th Cir. 1982) (citing *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972)). A procedural due process claim has two distinct elements: (1) a deprivation of a constitutionally protected liberty or property interest; and (2) a denial of adequate procedural protections. *Brewster v. Board of Educ.*, 149 F.3d 971, 982 (9th Cir. 1998).

The Fourteenth Amendment’s due process guarantee applies to public employees who have a “property interest” in the terms or conditions of their employment. *Roth*, 408 U.S. at 576. That interest is established “by existing rules or understandings that stem from an independent source such as state law rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” *Id.* at 577.

What procedures are required under the Due Process Clause depends on the circumstances of the case. *Brewster*, 149 F.3d at 983. “The determination of what procedures satisfy due process in a given situation depends upon an analysis of the particular case in accordance with the three-part balancing test outlined in *Mathews v. Eldridge*, 424 U.S. 319 (1976).” *Id.* In *Mathews*, the Supreme Court held that the factors to consider include the private interest that will be affected, the risk of an erroneous

1 deprivation of that interest through the procedures used, and the fiscal and administrative
2 burdens that any additional procedural requirements would entail. *Vanelli*, 667 F.2d at 778-
3 79 (citing *Matthews*, 424 U.S. at 335).

4 “The root requirement of the Due Process Clause is that an individual be given an
5 opportunity for a hearing *before* he is deprived of any significant property interest.”
6 *Clements v. Airport Authority*, 69 F.3d 321, 331 (9th Cir. 1995) (quoting *Cleveland Bd. of*
7 *Educ. v. Loudermill*, 470 U.S. 532 (1985)). Although the pre-termination hearing need not
8 be elaborate, some kind of hearing must be afforded the employee prior to termination. *Id.*
9 A plaintiff need only be accorded “oral or written notice of the charges against him, an
10 explanation of the employer’s evidence, and an opportunity to present his side of the story.”
11 *Brewster*, 149 F.3d at 985 (quoting *Loudermill*, 470 U.S. at 546). “An individual must have
12 an opportunity to confront all the evidence adduced against him, in particular that evidence
13 with which the decisionmaker is familiar. *Vanelli*, 667 F.2d at 780.

14 “A biased proceeding is not a procedurally adequate one.” *Clements*, 69 F.3d at
15 333. “At a minimum, Due Process requires a hearing before an impartial tribunal.” *Id.*
16 (citing *Ward v. Village of Monroeville*, 409 U.S. 57, 59-60 (1972)). Due process permits the
17 same administrative *body* to investigate and adjudicate a case as long as the same *person*
18 does not “serve both as decisionmaker and as advocate for the party that benefited from
19 the decision.” *Walker v. City of Berkeley*, 951 F.2d 182, 185 (9th Cir. 1991). Additionally,
20 Ninth Circuit law is clear that the decisionmaker in a predeprivation hearing need not be
21 impartial as long as an impartial decisionmaker is provided at the post-termination hearing.
22 *Id.* at 184; *accord Clements*, 69 F.3d at 333 n.15.

23 A *liberty interest* is implicated if a charge impairs the plaintiff’s reputation for honesty
24 or morality. *Vanelli*, 667 F.3d at 777 (emphasis added). “The procedural protections of due
25 process apply if the accuracy of the charge is contested, there is some public disclosure of
26 the charge, and it is made in connection with the termination of employment.” *Id.* “If a
27 liberty interest is thereby implicated, the employee must be given an opportunity to refute
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1 the stigmatizing charge.” *Mustafa v. Clark Cty. School Dist.*, 157 F.3d 1169, 1179 (9th Cir.
2 1998). “Injury to reputation alone is insufficient to establish a deprivation of a liberty
3 interest protected by the Constitution.” *Ulrich v. City and County of San Francisco*, 308
4 F.3d 968, 982 (9th Cir. 2002).

5 a. Property Interest

6 Concerning Zografos’ claim that CCSF violated his property interest in his
7 employment, in its opening brief, CCSF argues that its pre-termination process satisfied
8 due process requirements. It notes that it provided Zografos with a *Skelly* hearing, gave
9 him advanced notice of that hearing, notified him of the charges against him at the hearing
10 and provided the written documents supporting the charges, and gave him an opportunity
11 to respond in writing and to schedule another hearing if he so desired. It also notes that
12 Zografos in fact responded in writing.

13 As for the post-termination hearing, CCSF asserts that the procedure is set forth in
14 the City’s Charter, Civil Service Rules, and the MOU negotiated by Zografos’ union.
15 According to the rules and the MOU, Zografos had a right to appeal his termination before
16 a qualified and unbiased hearing officer, and had a right to challenge the competence of
17 the hearing officer if he believed the officer was biased or that prejudice would preclude a
18 fair hearing. CCSF contends that Zografos abandoned his post-termination appeal, and
19 therefore, cannot state a claim for deprivation of his procedural due process rights. *Correa*
20 *v. Napa Sch. Dist. No. 131*, 645 F.2d 814, 817 (9th Cir. 1981).

21 Zografos clarifies in his opposition that it is his position that he was denied a
22 meaningful pre-termination hearing, because he was: (1) deprived of key materials and
23 evidence collected by CCSF, and (2) the investigator and hearing officer were biased.
24 Without providing any citations to evidence of record, Zografos argues that CCSF obtained
25 evidence that Morey was the aggressor after Crawley wrote his final investigative report,
26 but failed to provide him with the exculpatory evidence and misled Zografos into believing
27 that no one witnessed the assault. Zografos also contends that the investigative report was
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1 biased as pre-ordained by Gee. He further argues that Gee was both the prosecutor and
2 the judge, having participated in the investigation and having served as the hearing officer.
3 Zografos also implies that the investigator, Sapp, was biased because Zografos had
4 previously testified against and filed a formal complaint against him.

5 Zografos did not, however, address the issue regarding his waiver or abandonment
6 of the post-termination hearing.

7 In reply, CCSF contends that Zografos misconstrues the evidence and how much
8 process was due during the pre-termination hearing. It notes that Zografos was provided
9 with the following procedural due process:

- 10 • Zografos was notified in writing of the charges against him more than
11 two weeks prior to the hearing;
- 12 • Zografos was notified that CCSF had placed him on administrative
13 leave pending an investigation into the "mistreatment of persons,
14 violence in the workplace, and assault;"
- 15 • Zografos was advised that the action taken against him was based on
16 the October 29, 2004 incident;
- 17 • Zografos was advised of the charges against him at the November 17,
18 2004 hearing;
- 19 • Zografos was provided with an investigation report and witness
20 statements at the hearing;
- 21 • Zografos was given an opportunity to respond to the charges at the
22 hearing;
- 23 • Zografos was offered an opportunity to respond in writing after the
24 hearing and to continue the hearing to a later date; and
- 25 • Zografos in fact responded in writing after the hearing.

26 In terms of the alleged bias, CCSF argues that Ninth Circuit law does not require an
27 impartial decisionmaker for a pre-termination hearing. *Walker*, 951 F.2d at 183. It further
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1 notes that Zografos has not provided any evidence of Gee's alleged bias.

2 Regarding allegedly withheld evidence, CCSF notes that Zografos fails to
3 demonstrate what evidence was withheld. It asserts that both Gee and Sapp had
4 expressed concern regarding the accuracy of the employee witness statements. It
5 acknowledges that after the hearing, Gee found out that certain employees had changed
6 their stories, but argues that this discovery following the hearing did not render the pre-
7 termination hearing deficient. CCSF also explains that the post-hearing evidence did not
8 exonerate Zografos.

9 Furthermore, CCSF notes that in the Ninth Circuit, defective pre-termination
10 hearings can be cured by post-termination due process. *Walker*, 951 F.2d at 184. Thus, to
11 the extent there were deficiencies, they may have been cured by a post-termination
12 hearing, but Zografos abandoned his post-termination hearing. As such, CCSF contends
13 that Zografos also abandoned any claim for deprivation of procedural due process at the
14 pre-termination hearing. *Correa*, 645 F.2d at 817.

15 At the November 22, 2006 hearing on this motion, Zografos also essentially
16 abandoned his claim of bias, instead contending that it was his position that indeed there
17 was in fact *no* pre-termination hearing. Zografos argued that because material evidence
18 was withheld, he did not receive a hearing on November 17, 2004. He contended that at
19 the time of the hearing, defendants gave him a witness statement from his co-worker Al
20 Sangimino, that they knew at the time was false. Zografos asserts that at the time of the
21 November 17, 2004 hearing, defendants had obtained additional statements from
22 Sangimino that they did not provide to him.

23 The court GRANTS summary judgment in favor of CCSF on Zografos' procedural
24 due process claim based on a property interest for the following reasons. First and
25 significantly, the claim fails because Zografos received the requisite procedural due
26 process at the pre-termination hearing required by Ninth Circuit law. See *Brewster*, 149
27 F.3d at 985. He received notice of the hearing, an explanation of CCSF's evidence, and an

1 opportunity to present his side of the story. *Id.* That is all that Ninth Circuit law required.
2 Given the fact that there is plenty of Ninth Circuit law on the issue, there is no need for the
3 court to rely on the out of circuit law cited by Zografos.

4 Zografos' suggestion that CCSF withheld evidence is not borne out by the evidence
5 in this case. In his opposition, he cited to no evidence in support of his argument that prior
6 to the pre-termination hearing, CCSF obtained exculpatory evidence that it then withheld.
7 See Oppos. at 14. Following questioning by the court at the November 22, 2006 hearing,
8 Zografos pointed the court to Sangimino's declaration, attached to attorney Duckworth's
9 declaration at exhibit J. Having reviewed the declaration, the court finds that Zografos still
10 has not provided it with any evidence that at the time Gee provided Zografos with
11 Sangimino's witness statement on November 17, 2004, Gee knew that the witness
12 statement was false. That allegation is simply not supported by the declaration.

13 Moreover, setting aside the fact that Zografos appears to have conceded his bias
14 arguments at the November 22, 2006 hearing, there are two reasons why these
15 arguments fail. First, Zografos again has not pointed to sufficient evidence that
16 demonstrates bias because he has not shown that Gee or Sapp served as the
17 "decisionmaker" following the pre-termination hearing. Second, Zografos waived this claim
18 by abandoning his appeal. Ninth Circuit law recognizes that even if the pre-termination
19 hearing officer is not impartial, no liability attaches as long as the post-termination appeals
20 adjudicator is impartial. See *Walker*, 951 F.2d at 185 (holding that "the failure to provide an
21 impartial decisionmaker at the pretermination stage, of itself, does not create liability, so
22 long as the decisionmaker at the post-termination hearing is impartial"); accord *Clements*,
23 69 F.3d at 333 n.15. Zografos was afforded the opportunity for a post-termination hearing
24 before an impartial judge, Susan Mosk, but waived it. See *Correa*, 645 F.2d at 817.

25 b. Liberty Interest

26 Zografos failed to oppose CCSF's motion on this issue, and conceded it at the
27 November 22, 2006 hearing. Accordingly, defendant's motion is GRANTED on this claim

1 as well.

2 2. Section 1983: Substantive Due Process Claim

3 In its opening brief, CCSF correctly notes that the Ninth Circuit has never resolved
4 the question of whether a discharged public employee can maintain a substantive due
5 process claim based on arbitrary and capricious discharge from employment, *see Portman*
6 *v. County of Santa Clara*, 995 F.2d 898, 908 (9th Cir. 1993), and that other circuits have
7 rejected such a claim. *See, e.g., Hill v. Borough of Kutztown*, 455 F.3d 225, 234 n.12 (3rd
8 Cir. 2006); *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994).

9 However, even if this court were to assume that a right to substantive due process
10 existed, CCSF argues that the evidence demonstrates that Zografos' termination was not
11 arbitrary and capricious. It notes that reasonable minds may differ as to whether Zografos
12 should have been terminated, but that CCSF had a proper governmental purpose in
13 seeking to reduce workplace violence. It contends that evidence indicated that Zografos'
14 continued employment may have been inconsistent with that purpose, and his termination
15 was therefore rationally related to that purpose.

16 In opposition, Zografos argues that CCSF violated his substantive due process
17 rights because it acted arbitrarily and capriciously in its decision to terminate him, and also
18 because it failed to provide him with a safe work environment.

19 Zografos argues that the Second Circuit and an Oregon district court have
20 recognized such a claim. *See O'Connor v. Pierson*, 426 F.3d 187, 204 (2d Cir. 2005),
21 *Baynton v. Wyatt*, 411 F.Supp.2d 1223 (D. Or. 2006). He contends that assuming such an
22 interest exists, CCSF acted in an arbitrary and capricious manner. He argues that the
23 evidence shows that Morey had a history of violence in addition to harassment with respect
24 to him. Zografos notes that months before the incident, Morey had threatened him, and
25 that there was evidence that Morey was the aggressor. Zografos also asserts that he
26 angered management by raising health and safety issues, and that Gee had made up his
27 mind regarding the incident prior to questioning Zografos or other witnesses.

1 As for CCSF's alleged failure to provide a safe working environment, Zografos
2 argues that the Ninth Circuit's decision in *L.W. v. Grubbs*, 92 F.3d 894, 896 (9th Cir. 1996)
3 supports recognition of such a constitutional claim.

4 Zografos then contends that CCSF acted with deliberate indifference in failing to
5 protect him from harm. He notes that he and Haver continually raised concerns regarding
6 their well-being and safety. He further notes Woods superintendent Williamson's August
7 2004 letter regarding the situation, and requesting a transfer of Morey and Zografos.
8 Zografos also notes that he and Haver met with Gee regarding the harassment. Zografos
9 contends that CCSF management took no action in spite of their awareness of Morey's
10 prior conviction for felony assault and other infractions. Zografos asserts that the day
11 before the assault, he alerted his supervisor, Frendo, of Morey's intention to engage
12 Zografos in a fight, but contends that Frendo did nothing.

13 In reply, CCSF correctly asserts that the cases cited by Zografos in favor of
14 recognition of an substantive due process claim based on arbitrary and capricious
15 termination do not actually recognize such a claim. It notes that the Oregon district court
16 *did not* per se recognize such a claim, but instead simply concluded that it was unwilling to
17 dismiss the claim at the Rule 12(b)(6) stage, and invited the defendant employer to renew
18 the issue at the summary judgment stage. *See Baynton*, 411 F.Supp.2d at 1226.

19 CCSF also cites to additional circuit decisions that refused to recognize a
20 substantive due process claim under similar circumstances, noting that "extending
21 substantive due process protection would eviscerate the long-standing and well-delineated
22 procedural process protections" and would result in district courts becoming courts of
23 general review for employment decisions. *See, e.g., McKinney v. Pate*, 20 F.3d 1150,
24 1158-60 (11th Cir. 1983); *Nicholas*, 226 F.3d at 143.

25 As for its alleged failure to provide Zografos with a safe working environment, CCSF
26 argues that Zografos' attempt to federalize the "state created danger" doctrine is not
27 supported by Ninth Circuit law, nor by his complaint (and that it constitutes an entirely new
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theory of relief in this case). CCSF notes that the state has no affirmative duty to protect persons from violence inflicted by private actors such as Morey, and that the two exceptions recognized by the Ninth Circuit are not applicable here. See *DeShaney v. Winnebago Cty.*, 489 U.S. 189, 196-97 (1989). Those two exceptions include (1) “special relationship” exceptions stemming from a custodial relationship between the state and victim; and (2) the “danger creation” exception stemming from “affirmative conduct on the part of the state in placing the plaintiff in danger.” See *L.W. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992) (“*Grubbs I*”). A “danger creation” claim requires the plaintiff to demonstrate: (1) affirmative conduct on the part of the state official; (2) that creates a dangerous situation; and (3) that the state official acted with deliberate indifference to the known or obvious danger in subjecting the plaintiff to the dangerous situation. *L.W. Grubbs*, 92 F.3d 894, 900 (9th Cir. 1996) (“*Grubbs II*”).

CCSF argues that Zografos cannot establish a “danger creation” claim because the danger was created by Morey in his private capacity, and Zografos cannot point to affirmative conduct by CCSF that proximately caused his injury. See *Van Ort v. Estate of Stonewich*, 92 F.3d 831, 835-36 (9th Cir. 1996) (“If a government officer does not act within his scope of employment under color of state law, then that government officer acts as a private citizen”). It also argues that CCSF could not have reasonably foreseen that Morey would assault Zografos based on Morey’s 30 year-old felony conviction particularly in the absence of other assaults by Morey on co-workers.

CCSF further contends that this case differs from the very few Ninth Circuit cases that have recognized the “state created danger” doctrine. In all other Ninth Circuit cases, CCSF notes that it was the individual government official whose affirmative conduct caused the harm; whereas, here, Zografos does not seek to hold any CCSF official liable. See Reply at 8.

The court GRANTS CCSF’s motion for summary judgment as to this claim. Even though the Ninth Circuit has not addressed the issue, the majority of circuits to address it

1 have concluded in well-reasoned decisions that there is *no* substantive due process claim
2 based on the arbitrary and capricious discharge from employment, and the authority cited
3 by Zografos in support of such a claim is not to the contrary. In particular, the Second
4 Circuit decision cited by Zografos does not support recognition of such a claim under the
5 circumstances of this case. In *O'Connor*, the public employer demanded that the plaintiff
6 employee release his medical records and submit to an independent psychiatric exam
7 before being allowed to return to work from an involuntary leave of absence. 426 F.3d at
8 204. The court held that the employer's demand for private medical records implicated the
9 plaintiff's privacy interests, a "fundamental" interest, and thereby supported a substantive
10 due process claim. Because of the impact of the medical record request on the *O'Connor*
11 plaintiff's continuing employment, the court found a derivative property-based substantive
12 due process right, but one that was *contingent on proof of a violation of his privacy interest*.
13 *Id.* Here, no such fundamental interest is implicated.

14 However, even if this court were to recognize the existence of a substantive due
15 process claim under the facts of this case, Zografos cannot demonstrate that CCSF's
16 decision was arbitrary and capricious. Reasonable minds could differ on the termination
17 decision. There was evidence before MUNI that went both ways: some suggested
18 Zografos was the aggressor, and other evidence suggested that Morey was the aggressor.
19 MUNI's decision to terminate Zografos in light of its anti-violence policies and the problems
20 that it was having at the Woods facility was not arbitrary and capricious given the fight that
21 occurred on October 29, 2004.

22 Moreover, Zografos' proffered "danger creation" theory fails for two reasons. First,
23 although Zografos noted at the November 22, 2006 hearing that he was basing this theory
24 on the actions of Buchbinder, Gee, and Crawley, he has not named any of them, let alone
25 *any* state actor, in his complaint. Second, this theory is undermined by the Ninth Circuit's
26 decision in *Van Ort*, since Morey, a private actor, inflicted the harm on Zografos. See 92
27 F.3d at 835-36. The very arguments that Zografos makes here were rejected by the Ninth
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Circuit in *Van Ort*. See *id.*

3. Section 1983 Claim: First Amendment

In its opening brief, CCSF correctly noted that in his complaint, Zografos alleged that it retaliated against him “for raising health and safety concerns to management and CAL-OSHA.” CCSF argues that such a claim fails because Zografos’ speech did not address matters of public concern, and because Zografos cannot establish a causal link between his allegedly protected speech and his termination.

CCSF contends that Zografos’ speech addressed neither matters of public concern, nor was it made in his capacity as a citizen. Instead, it argues that Zografos’ complaints regarding employees sleeping on the job and leaving work early, and regarding an unlocked exit door were not protected because they concerned individual personnel disputes and grievances. It contends that the complaints were not designed to, nor would they provide the public with an evaluation of MUNI’s performance. Moreover, it argues that Zografos’ complaints arose from his duties and in his capacity as a city employee, concerned about his personal safety and that of his co-workers, rather than as a citizen.

CCSF further contends that the causal link between Zografos’ speech and his termination is lacking because none of Zografos’ co-workers or supervisors knew that he had complained to OSHA regarding safety issues, and his complaint occurred nearly three years prior to his termination. It notes that the manager who recommended Zografos’ termination had no idea regarding the OSHA complaint until after the decision to terminate Zografos was made. Finally, CCSF argues that Zografos was terminated based on the fight with Morey, and that CCSF would have taken that action in the absence of his OSHA complaint.

Moreover, CCSF argues that Zografos’ co-workers’ threats did not constitute adverse employment action, and did not occur under color of state law. According to CCSF, the co-workers’ harassment resulted from Zografos’ repeated tattling on them regarding sleeping on the job and leaving work early, and the resulting response from

1 management.

2 Finally, CCSF notes that the complaints that Zografos alleges it failed to respond to
3 had nothing to do with Zografos' OSHA complaint, but instead concerned his co-worker's
4 behavior and personal grievances.

5 Zografos failed to address this argument in his opposition, and stated at the
6 November 22, 2006 hearing that he was conceding the claim. Accordingly, defendant's
7 motion is GRANTED on this claim.

8 4. *Monell* Liability

9 County and municipal officials, unlike state officials, may be sued for damages in
10 their official as well as their individual capacities. See *Monell v. New York City*, 436 U.S.
11 658, 691 (1978). However, section 1983 claims against city or county officials in their
12 official capacities are actually claims against the municipality and are "subsumed" by
13 *Monell* claims against the municipality. See *Lewis v. Sacramento Cty*, 98 F.3d 434, 446 (9th
14 Cir. 1996), *reversed on other grounds*, 523 U.S. 833 (1998) (reasoning, based on *Monell*
15 and *Kentucky v. Graham*, 473 U.S. 159 (1985), that claims against city officers in their
16 officials capacities were subsumed by a *Monell* claim against the city); accord *Berry v.*
17 *Gates*, 2001 WL 849639 at *6 (C.D. Cal. 2001); see also *Graham*, 473 U.S. at 165 & 167
18 n.14 (holding that there is no longer a need to bring official capacity actions against local
19 government officials because under *Monell*, local government units can be sued directly);
20 *Monell*, 436 U.S. at 690 n. 55.

21 Additionally, local government entities are considered "persons" for purposes of
22 section 1983, and can be sued directly for monetary, declaratory, or injunctive relief where
23 "the action that is alleged to be unconstitutional implements or executes a policy statement,
24 ordinance, regulation or decision official adopted and promulgated by that body's officers."
25 *Monell*, 436 U.S. at 690. However, a municipality "cannot be held liable under § 1983 on a
26 *respondeat superior* theory," that is, "solely because it is a tortfeasor." *Id.*

27 In order to hold CCSF liable under section 1983, Zografos must show: (1) that he
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1 possessed a constitutional right of which he was deprived; (2) that the city had a policy; (3)
2 that this policy amount[ed] to deliberate indifference to his constitutional rights; and (4) that
3 the policy is the moving force behind the constitutional violation. *Van Ort*, 92 F.3d at 834
4 (citing *Canton*, 489 U.S. at 389-91). In other words, in addition to demonstrating a
5 constitutional violation, Zografos must also show that the violation was rooted in a policy or
6 custom directly attributable to CCSF.

7 *Failure to Supervise/Train*

8 “A policy can be one of action or inaction.” *Long v. County of Los Angeles*, 442 F.3d
9 1178, 1185 (9th Cir. 2006). A failure to train or supervise can amount to “policy or custom”
10 sufficient to impose liability on CCSF. *Anderson v. Warner*, 451 F.3d 1063, 1070 (9th Cir.
11 2006) (citing *City of Canton*, 489 U.S. 378 (1989)). In *City of Canton*, 489 U.S. 378 (1989),
12 the Supreme Court held that a local government may be liable for constitutional violations
13 resulting from its failure to supervise, monitor, or train, where such inadequacy amounts to
14 deliberate indifference to the rights of the people with whom the local government comes
15 into contact. See *id.* at 388; see also *Van Ort*, 92 F.3d at 835.

16 “[W]hen the need to remedy the omission ‘is so obvious, and the inadequacy so
17 likely to result in the violation of constitutional rights, . . . the policymakers. . . can
18 reasonably be said to have been deliberately indifferent to the need.’” *Id.* at 1195 (quoting
19 *Canton*, 489 U.S. at 390). “The continued adherence by policymakers ‘to an approach that
20 they know or should know has failed to prevent tortious conduct by employees may
21 establish the conscious disregard for the consequences of their action – the ‘deliberate
22 indifference’ – necessary to trigger municipal liability.” *Anderson*, 442 F.3d at 1186
23 (quoting *Board of County Commissioners v. Brown*, 520 U.S. 397, 407 (1997)). Although
24 the existence of a policy of deliberate indifference is generally a jury question, a
25 municipality will be entitled to summary judgment where a plaintiff has not demonstrated
26 program-wide inadequacy in training, and has, at best, demonstrated negligence in the
27 training of an individual officer. See *Alexander v. City and County of San Francisco*, 29

1 F.3d 1355, 1367-68 (9th Cir. 1994).

2 In order to establish that the city's failure to train was the "moving force" behind
3 plaintiff's alleged injury, a plaintiff must show that the alleged deficiency in training or
4 supervision actually caused the violation. See *Gibson*, 290 F.3d at 1196. In other words,
5 plaintiff must show that the violation "would have been avoided" had the city possessed a
6 different training or supervision policy. See *id.* "[T]he existence of a pattern of tortious
7 conduct by inadequately trained employees may tend to show that the lack of proper
8 training, rather than a one-time negligent administration of the program or factors peculiar
9 to the officer involved in a particular incident, is the 'moving force' behind the plaintiff's
10 injury." *Anderson*, 442 F.3d at 1186 (quoting *Brown*, 520 U.S. at 407-08).

11 Intervening private actions will preclude municipality liability for alleged negligent
12 supervision. *Van Ort*, 92 F.3d at 837. In *Van Ort*, the Ninth Circuit held that an off-duty
13 officer's "considerable disciplinary record," which included numerous citizen complaints for
14 excessive and improper force and unwarranted violence, in addition to other numerous
15 workplace violations resulting in reprimand, did not make the officer's subsequent assault
16 on plaintiffs foreseeable to the county. *Id.* Therefore, the necessary causal link was missing
17 for *Monell* liability. *Id.*; see also *Anderson*, 451 F.3d at 1068 (rejecting plaintiff's argument
18 that there was sufficient causal link where officer who assaulted him had "a reputation for
19 being prone to violence and aggressive behavior").

20 *Final Policymaker Theory*

21 As noted, there is no *respondeat superior* liability on behalf of a municipality;
22 therefore, the "cases make clear that the unconstitutional discretionary actions of municipal
23 employees generally are not chargeable to a municipality under section 1983." *Id.* (citing
24 *St. Louis v. Praprotnik*, 485 U.S. 112, 126 (1988) (plurality opinion) ("[i]f mere exercise of
25 discretion by an employee could give rise to a constitutional violation, the result would be
26 indistinguishable from respondeat superior liability")).

27 There are two routes to establish municipal liability under this theory. See *Ulrich*,

1 308 F.3d at 984. First, a plaintiff may show “that the decision-making official was, as a
2 matter of state law, a final policymaking authority whose edicts or acts may fairly be said to
3 represent official policy’ in the area of the decision.” *Id.* (quoting *Pembauer*, 475 U.S. at
4 480-81. Second, the plaintiff may show that “an official with final policymaking authority
5 either delegated that authority to, or ratified the decision of, a subordinate.” *Id.* (quoting
6 *Praprotnik*, 485 U.S. at 126-27).

7 *Pembauer* requires that an official policymaker make a deliberate choice from
8 among various alternatives to follow a particular course of action. *Gillette v. Delmore*, 979
9 F.2d 1342, 1348 (9th Cir. 1992) (citing *Pembaur*, 475 U.S. at 483-84). The authority to
10 exercise discretion while performing certain functions does not make the official a final
11 policymaker unless the decisions are final, unreviewable, and not constrained by the official
12 policies of superiors. See *Prapotnik*, 485 U.S. at 126-28.

13 In determining whether an official is a final policymaker for the county, the court
14 must first “identify the particular area or issue for which the official is alleged to be the final
15 policymaker.” *Cortez v. County of Los Angeles*, 294 F.3d 1186, 1189 (9th Cir. 2002) (citing
16 *McMillian*, 520 U.S. at 785). Next, while federal law provides the rules of decision on the
17 ultimate question of whether an official acts for the state or the county, the court must
18 analyze state law to determine the character of an official’s function. See *id.*; see also, 236
19 F.3d at 560-61. Whether an official is a final policymaker is a matter of law determined by
20 the judge rather than the jury, with reference to state law, including the state’s constitution,
21 statutes, and case law. See *Brewster v. Shasta County*, 275 F.3d 803, 806 (9th Cir. 2001);
22 *Patel v. Penman*, 103 F.3d 868, 879 (9th Cir. 1996). Under California law, a city’s Charter
23 determines whether an official is a final policymaker. See *Ulrich*, 308 F.3d at 985 (citing
24 *Hyland v. Wonder*, 117 F.3d 405, 414 (9th Cir. 1997).

25 “*Prapotnik* requires that a policymaker approve a subordinate’s decision *and the*
26 *basis for it* before the policymaker will be deemed to have ratified the subordinate’s
27 discretionary decision.” *Gillette*, 979 F.2d at 1348 (citing *Prapotnik*, 402 U.S. at 1005).

1 In its opening brief, CCSF notes that Zografos identified in his discovery a series of
2 specific actions taken against him by MUNI supervisors and co-workers as evidence of
3 *Monell* liability, and that he identified specifically MUNI managers such as Gee, Ware,
4 Sapp, Andrich, and Buchbinder. Zografos did not identify the city's Civil Service
5 Commission ("CSC"), though.

6 CCSF argues that it is not liable under section 1983 because the CSC is the final
7 policymaker with respect to employment matters in San Francisco, and the decision to
8 terminate Zografos' employment cannot be attributed to the CSC. CCSF contends that its
9 Charter provides that the CSC is the final policymaker on employment issues. See
10 Charter at sect. 10.100, 10.101; CSC Rules 103, 104, 122, 422. Nevertheless, CCSF
11 concedes that if the CSC were to delegate final policymaking authority to a department
12 head or were to ratify an unconstitutional policy, it could be held liable under *Monell*.

13 It contends, though, that there has been no such ratification or delegation of
14 authority by the CSC in this case. It implies that the language of the Charter prevented
15 delegation. It further argues that Zografos cannot show that the CSC, MUNI, or even the
16 MUNI managers ratified the conduct of Zografos' co-workers. Instead, it argues that CCSF
17 took numerous steps in the form of training programs, replacing the supervisor, and
18 discipline.

19 Finally, CCSF contends that there was no longstanding policy or custom of
20 constitutional violations.

21 In opposition, Zografos argues two theories for *Monell* liability: (1) a custom and
22 practice of management employees failing and refusing to take corrective action when an
23 employee complained about harassment; and (2) liability based on the final decisionmaker
24 theory.

25 Zografos' custom argument is similar to that described above in the legal standards
26 regarding negligent training and supervision. Zografos argues that both he and Haver
27 complained on numerous occasions regarding harassment, but that nothing was done. He
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1 contends that management ignored pleas from the Woods facility's superintendent,
2 Williamson, to take corrective action. He asserts that the systemic harassment is sufficient
3 under *Monell*.

4 As for the final policymaker theory, Zografos contends that Buchbinder, the human
5 resources director, was the final decisionmaker and the person ultimately responsible for
6 Zografos' termination. He contends that Buchbinder also knew of the harassment, but
7 failed to take corrective actions. Alternatively, Zografos argues that Buchbinder delegated
8 policymaking authority and/or ratified Gee's termination decision.

9 In reply, CCSF spends a fair amount of time addressing both of Zografos' arguments
10 regarding the bases for *Monell* liability. First, it contends that *none* of the employees
11 mentioned by Zografos had final policymaking authority regarding employment issues –
12 including Buchbinder, Gee, and Hursh. It notes that there is a distinction under *Monell*
13 between a final *policymaker* and a final *decisionmaker*. CCSF also notes that Zografos has
14 cited no facts or law to show that Buchbinder, Gee, and/or Hursh were final *policymakers* or
15 were delegated such authority. Instead, Zografos urges the court to ignore the Charter and
16 sources of local law.

17 CCSF does not dispute that Buchbinder, Gee, and Hursh have the authority to make
18 certain decisions regarding MUNI. However, it argues this decisionmaking authority is not
19 enough, and cites to *Pembauer*, in which the plurality concluded that "the County Sheriff
20 may have discretion to hire and fire employees without also being the county official
21 responsible for establishing county employment policy." 475 U.S. at 483 n.12. CCSF also
22 cites to *Prapotnik*, and notes that the plurality in that case held that the Civil Service
23 Commission – and not the Community Development Agency – was the final policymaker
24 with respect to personnel matters, notwithstanding the fact that the Community
25 Development Agency had broad power to manage its own affairs, including personnel
26 decisions. 485 U.S. at 129-30. The plurality reasoned that the CSC in *Prapotnik* was still
27 the final policymaker even though it had given the Community Development Agency the
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discretion to hire and fire employees. *Id.* at 130.

CCSF also points to the Ninth Circuit's decision in *Gillette* in support of its argument that Buchbinder, Gee, and Hursh were not final policymakers. 979 F.2d at 1344-45. It notes that in *Gillette*, the plaintiff firefighter claimed retaliatory discharge at the hands of several fire department officials, including the fire chief. *Id.* The *Gillette* plaintiff argued that the fire chief "had final authority with respect to disciplining the firefighters and had been delegated *de facto* authority to establish personnel policy within the Fire Department." *Id.* at 1349. The Ninth Circuit rejected the argument, and held that "municipal liability could be imposed on the basis of [the fire chief's] actions only if he was responsible for establishing the city's employment policy." *Id.* at 1350. Because the City Charter did not give the fire chief such responsibility, there was no *Monell* liability.

CCSF also contends that Zografos cannot establish a widespread custom, but instead presents a very limited picture. It notes that MUNI had policies prohibiting workplace harassment and violence generally, and, specifically, took action in response to Zografos' complaints, including the following:

- Ware, the Woods superintendent, investigated Zografos' March 2003 complaint, met with the employees involved, and resolved the matter;
- Ware removed the unit supervisor, Frendo, based on Frendo's inability or unwillingness to address conflict within the shop;
- CCSF disciplined Morey with a verbal warning in 2004 for namecalling;
- Andrich, a unit supervisor, considered Zografos' January 2004 complaint against Lopez, but was unable to determine what happened. Zografos admits there was no further harassment from Lopez;
- Williamson moved his office in July 2004 to better monitor employee conduct;
- Williamson intervened in and reprimanded both Zografos and Morey in an August 2004 shouting match; and

- Gee and Ware arranged for MUNI's EEO section to conduct several training programs in 2003 to address employee conflict.

CCSF also argues that Zografos cannot show a sufficient causal link between the alleged policy of failure to correct harassment and his injury. CCSF notes that Zografos has alleged that the custom or policy is "failing and refusing to take corrective action when an employee complained about harassment." However, it notes that Zografos then claims that he was injured when CCSF failed to provide him with procedural due process after the assault. It contends that there is no causal link between Zografos' injury and the alleged custom or policy, and further notes Morey's intervening role.

First, because Zografos cannot establish an underlying constitutional deprivation as to any of his section 1983 claims, he cannot establish *Monell* liability for CCSF. See *Van Ort*, 92 F.3d at 834.

However, even if he were able to establish a constitutional violation, his *Monell* claim fails on the merits. Zografos' first proffered basis for *Monell* liability – the final policymaker theory – fails because Zografos has not named in his complaint any city officials who acted as final policymakers in this case. However, even if he had, there could be no liability because the city's Charter and the evidence in this case clearly demonstrate that while Gee, Hursh, and Buchbinder may have been the final decisionmakers, they were not the final *policymakers*. Zografos simply has not pointed to any evidence indicating that the CSC either delegated its authority to the individuals or ratified their decisions.

Regarding MUNI's alleged policy of inaction with respect to harassment, this theory also fails because the evidence demonstrates to the contrary. The evidence reveals that Woods was a tense, hostile place to work given the cliques that existed and the personality conflicts amongst its employees. However, the evidence also shows that MUNI's *policy* was to attempt to redress the harassment. Zografos simply cannot show that the city's response to the harassment was the "moving force" behind his injury. See *Gibson*, 290 F.3d at 1196. Moreover, per the Ninth Circuit's decision in *Van Ort*, Morey's intervening

1 private actions preclude liability under *Monell*. 92 F.3d at 837.

2 5. State Law Claims

3 In its opening motion, CCSF argues that Zografos' four state law tort claims are all
4 barred by the exclusive remedy provision of the California's Worker's Compensation Act.
5 See Cal. Labor Code § 3600 *et seq.* It contends that Zografos' claims for intentional and
6 negligent infliction of emotional distress, negligent retention, and negligent supervision
7 arise from conduct that is a normal part of the employment relationship – in particular, the
8 city's supervision of its workforce. Therefore, CCSF argues that it was within the normal
9 risks of employment, and workers compensation is the only remedy. *Shoemaker v. Myers*,
10 52 Cal.3d 1 (Cal. 1990); *Vacanti v. State Compensation Ins. Fund*, 24 Cal.4th 800 (Cal.
11 2001).

12 Zografos argues his claims are not preempted because he asserts personal injury
13 claims that implicate fundamental public policy considerations. See *Maynard v. City of San*
14 *Jose*, 37 F.3d 1396, 1405 (9th Cir. 1994). Zografos contends that his assertion of health
15 and safety issues at work resulted in his injuries, and that the assertion of such issues is
16 recognized as a fundamental public policy by California law. *Skillsky v. Lucky Stores, Inc.*,
17 893 F.2d 1088, 1093 (9th Cir. 1990).

18 In reply, CCSF contends that in order for a plaintiff to qualify for the exception to
19 workers compensation exclusivity based on violations of fundamental public policy, the
20 plaintiff must have a viable tortious discharge claim. *Gannt v. Sentry Insur.*, 1 Cal.4th
21 1083, 1097-1101 (Cal. 1992); *Maynard*, 37 F.3d at 1405-06. However, Zografos dismissed
22 his claim for wrongful termination in violation of public policy on October 10, 2006.
23 Accordingly, it argues that the state law claims represent nothing beyond the normal risks
24 of employment. *Vacanti*, 24 Cal.4th at 800.

25 The court agrees that Zografos' claims based on CCSF's negligence, including
26 those for negligent infliction of emotional distress, negligent supervision, and negligent
27 retention, are all part of the normal risks of employment, and are therefore barred by the

workers compensation exclusivity provisions. See *Shoemaker*, 52 Cal.3d at 1; *Vacanti*, 24 Cal.4th at 800. However, at the November 22, 2006 hearing, the court sought clarification regarding Zografos' claim for intentional infliction of emotional distress.

Zografos responded that his intentional infliction claim qualifies for the fundamental public policy exception because CCSF retaliated against him based on his protected speech, the health and safety complaints. CCSF reiterated its position that once Zografos' section 1983 claims fail, and given his dismissal of the wrongful termination claim, the intentional infliction of emotional distress claim must fail as well. It argues that Zografos cannot simply concede his section 1983 claim based on the First Amendment issues, as he has done, and his wrongful termination claim, and then revive them via an intentional infliction of emotional distress claim in order to escape the workers compensation exclusivity provisions.

However, having reviewed the authority cited by CCSF in support of this position, the court is not persuaded that CCSF is entitled to judgment on Zografos' claim for intentional infliction of emotional distress, and DENIES CCSF's motion as to this state law claim.

The court has not yet determined whether it will exercise or decline to exercise supplemental jurisdiction over Zografos' sole surviving state law claim against CCSF. See *Ove v. Gwinn*, 264 F.3d 817, 826 (9th Cir. 2001). It is currently considering whether this single state law claim should be remanded, but would prefer, if a remand is the appropriate result, not to remand piecemeal. As Zografos' claims against Morey are outstanding, and as it is not clear whether a federal claim against Morey is viable, in a related order, the court has set this matter for a case management conference before pretrial practice begins, with all parties to be present.

6. Zografos' Objections to Evidence


The court OVERRULES Zografos' objections to CCSF's evidence.

CONCLUSION

For the reasons set forth above, the court GRANTS CCSF's motion for summary judgment as to the section 1983 claims and as to the state law claims for negligent infliction of emotional distress, negligent retention, and negligent supervision. The court DENIES CCSF's motion for summary judgment as to Zografos' claim for intentional infliction of emotional distress.

Dated: December 13, 2006

IT IS SO ORDERED.



PHYLLIS J. HAMILTON
United States District Judge